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Supreme Court of the United States

OCTOBER TERM, 1939

No. 69

WALTER E. PEARSON, State Treasurer of the State of Oregon
Petitioner
v.
RUTH HAYES McGRAW and EDMUND HAYES, as executors of the last will and testament of Edward Stephen Hayes, deceased, and as individuals
Respondents

RESPONDENTS' BRIEF

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Of Counsel for Respondents.

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RESPONDENTS' BRIEF

REFERENCE TO OPINIONS BELOW

This case is before the court upon a writ of certiorari to review a decision of the Supreme Court of the State of Oregon. The opinions of that court have not been officially reported. The original decision rendered January 19, 1939, is contained in 28 Oregon Advance Sheets 103 (86 P. (2d) 424). The opinion rendered

on March 7, 1939, denying petitioner's petition for rehearing, is contained in 28 Oregon Advance Sheets 403 (87 P. (2d) 766).

JURISDICTION

Petitioner invokes the jurisdiction of this court under Section 237 (b) of the Judicial Code as amended (U. S. C. A. 28:344 (b)).

Petitioner's supplemental brief correctly states the facts upon which jurisdiction of this court is based.

STATEMENT OF THE CASE

The case was presented to the Circuit Court of Oregon for Multnomah County, exercising probate jurisdiction, upon pleadings as enumerated in petitioner's supplemental brief and upon a written stipulation of facts embodied as Appendix A in petitioner's supplemental brief (p. 31). Petitioner's summary of facts is for the most part accurate except that counsel, in using their own language to summarize the stipulation, have inadvertently, we believe, created some impressions contrary to the facts as stipulated. Some additional facts should be called to the court's attention and some slight correction should be made in the statement by counsel for petitioner.

The question in this case is whether the Oregon Supreme Court was correct in holding that Oregon, the state of the domicile of Dr. Hayes, respondents' decedent, had no jurisdiction to levy an inheritance tax on a gift by decedent of federal reserve notes. The state court concluded that Oregon lacked jurisdiction because federal reserve notes are tangible personal property and the notes transferred by decedent had a

situs in Illinois at the time of the gift, and that taxation by Oregon of the transfer would constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

For over ten years prior to August 15, 1935, Harris Trust and Savings Bank of Chicago, Illinois, as decedent's agent, had administered a substantial part of Dr. Hayes' property. Assets so administered were held by the agent in Chicago (R. p. 46).* On August 8, 1935, Dr. Hayes directed the Chicago agent to sell bonds and with the proceeds and with other credits to his account in the Chicago bank to buy federal reserve notes. That was done. On August 12, 1935, when the notes were so acquired, they were placed in Dr. Hayes' safety deposit box in a vault in Chicago (R. p. 47). On August 15, 1935, decedent, then in Oregon, executed a trust agreement conveying the notes irrevocably to Harris Trust and Savings Bank, as trustee of a trust for the benefit of decedent's daughter and son, their spouses and children. The trustee executed the agreement on August 17, 1935 (R. p. 48). On August 19, 1935, the first of the notes were removed from the box by the trustee. Thereafter, the trustee used the notes to purchase for the trust assets consisting of bonds and other personal property (R. pp. 48-49). It was stipulated that the gift was made by decedent in contemplation of his death (R. p. 48).

Counsel, at page 3, state that the securities owned by decedent had been in Chicago, Illinois, in the custody of Harris Trust and Savings Bank, his financial agent, "for some time" prior to the transfer by agreement dated August 15, 1935. The stipulation of facts

*References herein are to pages of record as reprinted in this court.

recites that that course of business had been in effect for "over ten years prior to August 15, 1935" (R. p. 46).

Counsel refer to two trusts, trusts Nos. 1 and 2. The facts relating to those trusts should be stated somewhat more fully. The first trust, the one directly involved, was created by the agreement dated August 15, 1935, by which decedent transferred federal reserve notes to the trustee. That trust was for the benefit of decedent's daughter and son, their spouses and children. Decedent retained absolutely no interest in the property transferred, in the trust estate, or in the income therefrom (R. pp. 25-37). The trust agreement was expressly made irrevocable (R. p. 37). Trust No. 2 was created by an agreement between decedent and the same trustee, dated September 19, 1935 (R. pp. 6-21). In that trust decedent reserved to himself the income for life (R. p. 7) with the provision that the income should go to his widow after his death for her life (R. p. 7) with remainders over to same beneficiaries as are named in the trust No. 1 agreement (R. p. 7, et seq.). In the No. 2 trust agreement decedent expressly reserved the right to revoke the trust or alter, amend, change or modify it (R. p. 19).

Respondents did not object to the imposition by Oregon of tax on gross estate which included assets of a value of $608,967.61 held by the trustee in trust No. 2 at the date of death (R. p. 22). Indeed, in the petition which respondents presented to the probate court for an order determining inheritance tax, they alleged that assets of trust No. 2 should be subject to tax (R. p. 3). The controversy between the parties relates to the propriety of the inclusion in the estate subject to

tax of the federal reserve notes transferred by the trust agreement dated August 15, 1935, to create trust No. 1.

At page 6, counsel recite that decedent executed the trust No. 1 agreement on August 15 and that it was executed by the trustee on August 17. Counsel proceed to say, "Thereafter, commencing August 19, 1935, the trustee, from time to time, reconverted the money into securities and other personal property (R. p. 119)". The stipulation of facts merely recites that from time to time, after August 19, federal reserve notes were removed from the safety deposit box where they were at the time of the gift and were "thereafter" used by the trustee to purchase bonds and other personal property for the account of trust No. 1. The stipulation does not recite how long the trustee retained possession of the federal reserve notes or when the actual purchases of bonds by the trustee began. So far as the stipulation shows, the interval between the taking of possession of the notes by the trustee and the use thereof by the trustee to purchase property for the trust may have been several weeks or longer (R. pp. 48-49).

Petitioner's summary of facts does not state the important fact that the assets purchased by the trustee for the account of trust No. 1 included no property ever owned by decedent. In particular, the trustee "did not purchase or otherwise acquire for said Edward Stephen Hayes Trust Number One any of the bonds or other assets which at any time were owned by decedent or which at any time constituted a part of the property held by said Harris bank as agent for decedent" (R. p. 49).

SUMMARY OF ARGUMENT

1. The transfer here in question was of federal reserve notes then located in Chicago, Illinois, and was not a transfer of anything else.

2. A federal reserve note is tangible personal property as distinguished from intangible personal property such as bonds, stocks, notes, mortgages, bank deposits, etc.

3. The state of the domicile of the decedent has no jurisdiction to tax a transfer of tangible personal property situated in another state. The imposition of a tax by the state of the domicile on the transfer of tangible personal property situated in another state would be in violation of the Fourteenth Amendment to the Constitution of the United States.

4. The facts of this case show that the federal reserve notes transferred had a situs in Illinois so that the State of Illinois had jurisdiction over the property and over the transfer thereof. This conclusion is supported by the decisions of this court in cases involving jurisdiction of states to tax tangible personal property.

5. The fact that the owner of tangible personal property located in a state other than the owner's domicile may have a present intention to dispose of the goods or to move them to another location is immaterial in determining situs of tangible personal property.

6. It is not essential in order that an owner may establish a situs for tangible personal property in a state other than that of his domicile that he have a "business" purpose in placing the property in the other state.

7. The fact that a person adopts a certain course of conduct for the purpose of reducing or avoiding entirely tax liability is immaterial in determining whether a transaction is subject to tax. One may succeed in his desires to reduce or avoid liability for taxes if he adopts a course of conduct which produces a nontaxable result if his conduct is real and not merely a concealment of something different. In that event, his motive in adopting that course of conduct is immaterial.

ARGUMENT

I. THE TRANSFER WAS OF FEDERAL RESERVE NOTES AND NOTHING ELSE.

It is essential to emphasize that the transaction was a transfer of the specific federal reserve notes and of nothing else.

Prior to August 8, 1935, decedent owned certain bonds and credits to his account in his Chicago bank. The bonds were in Chicago in an agency account administered by the Chicago bank. That method of administration of decedent's property had been in effect for over ten years. (R. p. 46). He directed his Chicago agent to sell bonds in the open market. On August 12, 1935, with the proceeds of the sale of the bonds, together with other credits to his account in his Chicago bank, his Chicago agent purchased for him the federal reserve notes and the notes were placed in his safety deposit box in Chicago. The bonds initially owned by the decedent and the credits to his bank account were not the subject of the transfer because when the bonds were sold decedent was no longer the owner thereof and when the credits were

used in the purchase of the federal reserve notes decedent no longer owned them (R. pp. 46-47).

During the interval between the time of the acquisition by the decedent of the federal reserve notes and the completion of the transfer, decedent owned no property involved in this transaction which could have been the subject of the transfer other than the federal reserve notes.

After the transfer of the federal reserve notes was completed, the decedent had absolutely no right and no power whatsoever to direct or control the trustee with respect to the administration thereof. By the terms of the trust agreement the trustee was directed to invest funds from time to time available for investments and reinvestments "in whatever form of property, *real or personal*, the trustee in the exercise of its discretion shall deem proper and for the best interests of the trust estate, . . . " The only limitation on the power of the trustee to make investments was that investments should be approved by certain named persons other than the decedent (R. pp. 30-31).

After the gift was completed, the trustee invested the corpus of the trust, that is to say, it used the federal reserve notes to purchase in the open market income-bearing intangible personal property, but the intangible personal property so acquired by the trustee included none theretofore owned by the decedent and, in particular, included none of the bonds theretofore owned by the decedent which were sold to acquire the funds for the acquisition of the federal reserve notes (R. p. 49). That intangible personal property acquired by the trustee could not have been

the subject of any transfer by decedent because decedent never owned that property and never had any right to make any transfer of it.

The Oregon Supreme Court analyzed the facts in detail and reached the conclusion that this transfer was of federal reserve notes and of nothing else (28 Oregon Advance Sheets 103, 108, 86 P. (2d) 424, 427). We cannot see that there can be any difference of opinion on that question of fact.

Counsel for petitioner argue that respondents "take too narrow a view", and assert that the entire course of events, starting when decedent owned bonds and extending until after the gift, should be considered as a single event (Supplemental Brief, p. 8). But even though Dr. Hayes may have planned in advance every step right up to the actual gift, still, so long as he retained matters under his sole control so that he was free to change his mind and refrain from proceeding with the next step, each step constituted a separate transaction. If he had stopped anywhere short of the actual transfer by gift, there would have been no taxable event.

The court should then approach the case upon the premise that decedent, domiciled in Oregon, made a transfer of federal reserve notes then located in Illinois. The question to be answered is whether in the circumstances the Oregon Supreme Court was correct in holding that Oregon, the domicile of decedent, had no jurisdiction over the property because it was situated in Illinois, and that Oregon could not tax the transfer thereof.

II. A FEDERAL RESERVE NOTE IS TANGIBLE PERSONAL PROPERTY.

It is necessary to determine the character of the property transferred, that is, whether the federal reserve notes were tangible or intangible personal property. That question must be answered because the rules relating to jurisdiction to tax vary depending upon whether the property involved is intangible or tangible.

Although petitioner does not controvert our assertion that a federal reserve note is tangible personal property, we cite, for the convenience of the court, the authorities which support that conclusion.

This court held in *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749, that money consisting of bank notes and coins "is tangible property and cannot be distinguished" from the personal property consisting of paintings and furniture considered by the court in *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058.

In *Blodgett v. Silberman*, the court did not describe the money in question other than to refer to it as "bank notes and coin", but the court was apparently of the opinion that anything which passes current for money is tangible personal property.

In the present case the conclusion that a federal reserve note is tangible personal property is re-enforced by the fact that the statute includes federal reserve notes within the definition of "coins and currency" and makes them legal tender. See Act of May 12, 1933, 48 St. L. 52, as amended by Act of June 5, 1933,

48 St. L. 113 (U. S. C. A. 31:462). The statute as amended is quoted in full in the appendix, post, page 52.

Whatever is legal tender is tangible personal property. Legal tender is a thing having value in and of itself. Its value lies in the fact that it may be used to extinguish debts and obligations to pay money. It is not like a promissory note or bond or a written promise which is merely evidence of intangible rights to receive performance of the obligations therein expressed. If a federal reserve note were considered to be a written promise to pay money—mere evidence of a chose in action—then that promise could be satisfied by legal tender. But such a promise, which can be satisfied by the federal reserve note itself, cannot constitute a promise to make the note mere evidence of intangible rights. No such promise has value as such, and the sole value of the paper lies in the fact that it, as a tangible chattel, may be used to extinguish choses in action.

The ultimate question to be determined is whether in the circumstances the State of Oregon had jurisdiction over that tangible personal property by virtue of the fact that the owner was domiciled in that state.

III. THE STATE OF THE DOMICILE OF A DECEDENT HAS NO JURISDICTION TO TAX THE TRANSFER OF TANGIBLE PERSONAL PROPERTY SITUATED IN ANOTHER STATE.

A transfer of tangible personal property may be taxed only by the state of its situs. Taxation thereof by the state of the domicile when it is situated elsewhere is barred by the Fourteenth Amendment to the

Federal Constitution. *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603, 69 L. Ed. 1058; *Blodgett v. Silberman*, 277 U. S. 1, 48 S. Ct. 410, 72 L. Ed. 749; *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *Delaware, Lackawanna, & Western Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 S. Ct. 669, 49 L. Ed. 1077.

Blodgett v. Silberman, supra, applied that rule to tangible personal property consisting of bank notes and coins located in a safety deposit box in New York, and held that Connecticut, the state of decedent's domicile, had no jurisdiction to levy an inheritance tax on the transfer thereof.

Blodgett v. Silberman has been followed in two state cases which applied the same rule to transfers of coins and currency. *Snodgrass Estate*, 20 Pa. D. & C. 598; *Waldron's Estate*, 84 Colo. 1, 267 Pac. 191.

The rule is otherwise with respect to transfers of intangible personal property. Ordinarily the state of domicile of the deceased owner has jurisdiction to tax the transfer of property of that type despite the fact that the physical evidence of the intangible rights is held and administered in another state. *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830; *Blodgett v. Silberman*, supra. Indeed it has been held that in some circumstances the state of the domicile is the only state which has jurisdiction to tax the transfer. *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371; *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436, 74 L. Ed.

1056; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, 51 S. Ct. 54, 75 L. Ed. 131; *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313.

In two very late cases it was held that in the circumstances therein shown the transfers of rights in intangible personal property might be subject to tax by both the state of the domicile of the decedent and the state wherein the evidences of intangible rights were being administered. *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 865; *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 880.

The reason for the difference in the rules relating to tangible property and intangible personal property has been discussed in many cases. The most recent statement on the subject by this court appears in *Curry v. McCanless*, supra, wherein the court said:

> "That rights in tangibles—land and chattels—are to be regarded in many respects as localized at the place where the tangible itself is located for purposes of the jurisdiction of a court to make disposition of putative rights in them, for purposes of conflict of laws, and for purposes of taxation, is a doctrine generally accepted both in the common law and other legal systems before the adoption of the Fourteenth Amendment and since. Originating, it has been thought, in the tendency of the mind to identify rights with their physical subjects, see Salmond, Jurisprudence (2nd ed.) 398, its survival and the consequent cleavage between the rules of law applicable to tangibles and those relating to intangibles are

attributable to the exclusive dominion exerted over the tangibles themselves by the government within whose territorial limits they are found. (Citing cases.) The power of government and its agencies to possess and to exclude others from possessing tangibles, and thus to exclude them from enjoying rights in tangibles located within its territory, affords adequate basis for an exclusive taxing jurisdiction. When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others. Other states have been said to be without jurisdiction and so without constitutional power to tax tangibles if, because of their location elsewhere, those states can afford no substantial protection to the rights taxed and cannot effectively lay hold of any interest in the property in order to compel payment of the tax." (Citing cases.)

Unless, then, there are circumstances in the present case which remove it from the rules generally applied, it follows that Oregon, the state of domicile of decedent, had no jurisdiction over the tangible personal property consisting of federal reserve notes located in the State of Illinois, and had no jurisdiction to tax the transfer thereof. Under the rule applied in the cases

cited above relating to tangible personal property, the imposition by Oregon of a tax on the transfer of the property would violate the Fourteenth Amendment.

IV. THE GROUNDS RELIED UPON BY PETITIONER ARE INSUFFICIENT TO MAKE INAPPLICABLE TO THIS CASE THE GENERAL RULES DISCUSSED HEREINBEFORE.

We discuss in this subdivision the reasons asserted by petitioner in support of his contention that this case should be distinguished from cases cited and relied on by respondents. We have not followed precisely the order used by counsel in petitioner's supplemental brief, but we have endeavored to meet all grounds for distinction asserted by counsel.

A. The Federal Reserve Notes Were "Permanently Located" in Illinois.

One ground of petitioner for asserting that the rules stated above are not here applicable is that although the notes were physically present in Illinois, they did not have a situs in the legal sense in Illinois. Petitioner argues that situs is established only after the property has acquired "permanent location" and is "permanently located", and is "not merely transient, transitory or temporary but . . . fixed in an established abiding place" as those phrases are used in cases such as *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96; *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; and *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29, 79 L. Ed. 228. Petitioner argues that that essential element of permanency is absent in this case.

Questions relating to situs of tangible personal property cannot be resolved by resort only to such phrases. The word "permanent" is necessarily comparative and indefinite. Nothing other than real estate is situated permanently in one place, if the word "permanent" means perpetual or eternal. On the other hand, "mere physical presence" in a state other than the domicile of the owner is not necessarily sufficient to establish situs; and respondents have never taken such a position, as is attributed to them by counsel for petitioner (Supplemental Brief, p. 23). The line between facts sufficient to establish situs for tangible personal property physically present in a state and those which are insufficient can be located only as processes of judicial definition have placed close cases on one side or the other. As the number of judicial decisions increases and as close cases are decided, the position of that line of demarcation becomes apparent.

In his classic on the common law, the late Mr. Justice Holmes described that process of judicial definition in the following language:

> "The growth of the law is very apt to take place in this way. Two widely different cases suggest a general distinction, which is a clear one when stated broadly. But as new cases cluster around the opposite poles, and begin to approach each other, the distinction becomes more difficult to trace; the determinations are made one way or the other on a very slight preponderance of feeling, rather than of articulate reason; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn

a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood of where it falls." (Holmes, The Common Law, p. 127.)

If the phrases quoted by petitioner such as "permanent location" and "permanently located" are to be accepted as tests of jurisdiction, it is necessary to define those terms by references to specific cases located in varying degrees of proximity to the line between the existence and nonexistence of jurisdiction. It is not sufficient to do as counsel for petitioner have done, that is, to attempt to prove that the federal reserve notes did not have a situs in Illinois by showing that this case is not as far from the dividing line as the cases which petitioner cites.

On the side of the line where the state within whose geographical limits tangible personal property is located does not have jurisdiction are the transit cases. It is firmly established that where tangible personal property is in a state, but merely for purpose of transit in that state in interstate commerce, the state cannot impose a property tax thereon. To do so would impose a burden on interstate commerce in violation of the commerce clause (Art. I, Sec. 8, Constitution). *Coe v. Town of Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *Kelley v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359; *Champlain Realty Co. v. Town of Brattleboro*, 260 U. S. 366, 43 S. Ct. 146, 67 L. Ed. 309. Cf. *American Express Co. v. Iowa*, 196 U. S. 133, 25 S. Ct. 182, 49 L. Ed. 417.

On the other side of the line are the cases the facts of which satisfy the test stated in *Minnesota v. Blasius*,

290 U. S. 1, 54 S. Ct. 34, 78 L. Ed. 131, wherein the court said:

> "Where property has come to rest within a state, being held there at the pleasure of the owner, for disposal or use, so that he may dispose of it either within the state, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the state and is thus subject to its taxing power."

It may be difficult in a given case to determine whether transit in interstate commerce has begun or ended, but when that fact question is answered, the legal conclusion is reached without difficulty.

There are several cases much closer to the line than the present case which, we believe, compel the conclusion that the federal reserve notes had a situs in Illinois at the pertinent time and consequently were not subject to the jurisdiction of Oregon.

In *Brown v. Houston*, 114 U. S. 622, 5 S. Ct. 1091, 29 L. Ed. 257, this court considered the power of the State of Louisiana to levy a personal property tax on coal owned by residents of Pennsylvania. The coal had been mined in Pennsylvania and had been moved by barges to New Orleans and at the pertinent time was being held on barges at New Orleans for sale. The court held that the coal had a taxable situs in Louisiana. The court said:

> "It (the tax) was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the

market of New Orleans. It might continue in that condition for a year or two years, *or only for a day.*" (Italics ours.)

Situs, then, may be "permanent" even though "only for a day". See, in accord, *Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577, 15 S. Ct. 415, 39 L. Ed. 538.

Indeed chattels brought into a state for the sole purpose of temporary storage and reshipment into other states have a situs at the place of storage despite the intention of the owner that they shall shortly be moved outside of the state. This principle was applied in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538. In that case plaintiff was a manufacturer of nails, wire and other material at plants outside of Tennessee. The method by which it conducted its business was generally as follows: It shipped goods to Memphis, Tennessee. At that point they were received by a transfer company which placed them in storage temporarily and then reshipped the goods out of storage in original packages to destinations, for the most part, outside of the City of Memphis and outside of the State of Tennessee. This court held that under that practice the goods acquired a situs in Memphis when they were received and stored even temporarily at that point, and were subject to tax at that location.

The same principle was applied in *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754. In that case plaintiff produced and refined petroleum products at plants in Pennsylvania and Ohio. Products so produced were shipped in tank cars to a storage

plant at Memphis, Tennessee. The oil was unloaded at Memphis only for repackaging and distribution in smaller containers to purchasers in states other than Tennessee. In fact, the products for which contracts of sale had already been made were, on arrival at Memphis, placed in tanks marked "Oil already sold in Arkansas, Louisiana and Mississippi". The oil so sold, segregated and marked remained in Tennessee only a few days and only long enough to be properly packaged and distributed according to orders. In those circumstances, this court held that the property acquired a situs for taxation in Memphis.

In *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, this court sustained the power of the State of Illinois to tax grain located in the owner's warehouse in Illinois. The circumstances relating to the purpose of the storage and the owner's intentions with respect thereto were as follows: The grain had been shipped by the original owners from southern and western states, consigned to New York and Philadelphia. The contracts for carriage reserved to the owners the right to remove the grain from cars at Chicago for temporary purposes of inspecting, weighing, grading, mixing, etc. Bacon purchased the grain while it was in transit to Chicago and succeeded to the rights of his vendors under the contracts of shipment. At Chicago he removed the grain from the cars to his private elevator. "This removal, . . . was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination." No part of the grain was sold or consumed in Chicago but all of it was later shipped to the destinations specified. The court held

that Illinois had power to tax the grain. The court pointed out that while the grain was in Chicago the owner had full possession of the grain and that his intention to send it to another state and there dispose of it was not controlling. The court said:

> "He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping, and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation."

In *Minnesota v. Blasius*, supra, the State of Minnesota attempted to assess and levy a tax on eleven head of cattle owned by defendant, Blasius, and held by him in the stockyards at South St. Paul, Minnesota, on May 1, 1929, the assessment date. Blasius was in the business of buying and selling livestock in that market. He did not sell for slaughter but resold to those engaged in feeding cattle. The particular animals were purchased by Blasius on April 30, 1929. Seven of the eleven head were sold by him on May 1 to a nonresident purchaser and were immediately shipped to points outside of Minnesota, and the remaining four head were similarly sold and shipped on May 2. This court held that Minnesota had power to levy the tax and used the language hereinbefore quoted (ante, p. 18).

Phrases such as "permanently located" and "established abiding place" cannot be used without further definition as tests of the existence of jurisdiction. The decisions in cases closer to the line than were the cases in which the phrases were used teach us the correct

and more precise meaning. From the cases we learn that on one side of the line fall the transit cases and on the other side of the line are cases such as those just cited where the duration of location in a given state was very brief. From those cases where the duration of situs was short, but still sufficient to establish a taxable situs in the state of physical presence, we learn that location may be "permanent" even though it is "only for a day" (*Brown v. Houston*, supra), or only long enough to repackage and reship to other states to fill orders already received (*General Oil Company v. Crain*, supra), or only long enough to inspect, weigh, grade, mix, etc., prior to reshipment to a previously determined destination in another state (*Bacon v. Illinois*, supra), or only long enough to resell and reship out of the state, which consumes only a day (*Minnesota v. Blasius*, supra). If the property is at rest in a state subject to the dominion of the owner to hold or dispose of it as he wishes, it is "permanently located" and has an "established abiding place" in that state and has a situs at that place (*Minnesota v. Blasius*, supra).

If that test is applied to the facts of this case, the conclusion must be that the federal reserve notes transferred by decedent had a situs in Illinois at the time of the transfer. At that time they were located in Dr. Hayes' safety deposit box in Chicago. They were subject to his and only his dominion and control. So long as he owned the notes he had the right and the sole power to hold them or dispose of them as he alone wished. Dr. Hayes at that time was free to hold the notes indefinitely or to dispose of them by gift or by any other process. If, between the time when he

acquired the notes and the time he gave them away, he had changed his mind, as he was free to do, and had elected not to make the gift, he could have done so without responsibility to anyone.

The conclusion that the notes had a situs in Illinois becomes clearer if we consider facts in an assumed situation. Let us suppose that at the time Dr. Hayes decided to purchase federal reserve notes, the supply of notes available in Chicago or in Illinois was insufficient to meet his requirements so that his agent in Chicago was required to procure the notes from the federal reserve bank in New York. After the notes had been thus procured and shipped to Chicago and while they were in transit across the intervening states of Pennsylvania, Ohio and Indiana, they would not have acquired a taxable situs in any one of the intervening states because they would have been in transit in interstate commerce. However, when they arrived in Chicago and had come to rest and had been placed in a safety deposit box subject to the dominion of Dr. Hayes to keep or dispose of them as he wished, they acquired a situs for taxation in Illinois. If they were the type of property which under the Illinois statute was subject to personal property tax, there can be no question but that at the termination of the transit and at the time of the placement in the box in Chicago, they would be subject to the jurisdiction of the State of Illinois for tax purposes. If they then had a situs in Illinois for tax purposes, it is clear under the authority of the cases which we have cited that no state other than Illinois would have had jurisdiction to levy a tax upon the transfer thereof.

The stipulation of facts upon which the present case was presented to the lower court and to the Oregon Supreme Court does not state the source from which Dr. Hayes' agent acquired the federal reserve notes when it purchased them for Dr. Hayes. The stipulation merely recites that the notes were in Illinois at the time of the transfer, that they had never been within the State of Oregon prior to the acquisition by Dr. Hayes, and to the knowledge of the parties have never since been in the State of Oregon. (R. p. 47).

If they were acquired through some transit process as suggested in the assumed case, they acquired a situs in Illinois at the termination of the transit. If they were acquired by the agent directly from some financial institution in Chicago so that they were not in transit immediately prior to the purchase thereof by Dr. Hayes, it follows with greater force that they had a situs in Illinois prior to the purchase by Dr. Hayes and continued to have a situs in Illinois when they were purchased by him and placed in his safety deposit box.

Thus far we have considered the case to show that the notes had a situs in Illinois because they were at rest in the state subject to the dominion of the owner, and have not discussed other facts which show additional elements of permanency. Dr. Hayes for over ten years prior to 1935 had handled a substantial part of his business of investing his property and collecting principal and income through his agent, Harris Trust and Savings Bank, in Chicago. His securities thus administered were at all times in Chicago. Income and principal, as collected, were deposited to his checking account in the bank at Chicago. No business

of any nature with respect to that portion of his property was handled elsewhere. Dr. Hayes moved to Oregon in September, 1933, and before that had been domiciled for over fifty years in Wisconsin. The business practices here described were adopted, then, many years before he came to Oregon. His change of residence made no change in his methods of conducting his financial affairs in Chicago through his Chicago agent (R. pp. 45-46).

There have been many cases decided by this court which hold that if a person conducts a business in a state other than the state of his domicile, intangible personal property associated with that business may be subject to tax by the state in which the business is conducted. *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143, and cases cited. The Oregon Supreme Court, in its decision on rehearing, held that the circumstances with respect to the administration of Dr. Hayes' intangible personal property in Illinois over that long period were sufficient to establish a business situs for his intangible personal property in Illinois (28 Oregon Advance Sheets 403, 408, 87 P. (2d) 766, 768).

The fact that the intangible personal property may have had a business situs in Illinois did not necessarily preclude the imposition of personal property taxes on that same property by Wisconsin while Dr. Hayes was domiciled there and by Oregon after he moved to Oregon. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40, 62 L. Ed. 145; *Cream of Wheat Co. v. Grand Forks County, North Dakota*, 253 U. S. 325, 40 S. Ct. 558, 64 L. Ed. 931; *Curry v. McCan-*

less, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 865. Indeed, respondents, without objection, paid inheritance tax to the State of Oregon determined upon the basis of the assets of the revocable trust established by Dr. Hayes by an agreement dated September 19, 1935, of which Harris Trust and Savings Bank was trustee, wherein Dr. Hayes reserved the income for life and which was being administered by the trustee in Chicago at the time of his death. See *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830; *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913, 83 L. Ed. 880.

The fact of the long-continued practice of administration of intangible personal property in Chicago is important, quite aside from the question of whether or not that property, while so administered, was subject to personal property tax by Illinois or Oregon or both, because it showed Dr. Hayes' intent that his property should remain in Illinois. For his tangible personal property, to which the fiction of *mobilia sequuntur personam* does not apply, the conclusion is re-enforced that the situs was in Illinois, however brief the duration of that situs may have been for individual items of tangible property. That conclusion of the Oregon Supreme Court in its decision denying the petition for rehearing is correct (28 Oregon Advance Sheets 403, 408, 87 P. (2d) 766, 768).

Counsel rely on *Southern Pacific Company v. Kentucky*, 222 U. S. 63, 32 S. Ct. 13, 56 L. Ed. 96. In that case the court held that Kentucky, the state of incorporation of the owner, had jurisdiction to tax ocean-going vessels because the vessels had not ac-

quired a situs elsewhere. The rules relating to situs of vessels are peculiar to that type of property and are not applicable to tangible personal property generally. Cooley, on Taxation (4th Ed.), Sec. 453. That difference was recognized by this court in *City Bank Farmers' Trust Co. v. Schnader*, supra, wherein the court said:

> "In respect of situs for taxation, the collection of portraits is quite unlike vessels and railway rolling stock that in fulfilling the purpose for which they are created move from place to place and into different states."

Tangible personal property in transit does not acquire a situs in a state through which it passes. By a parity of reasoning the vehicle in which the property is carried in transit acquires no situs. Cases relating to vessels used in interstate and foreign commerce are to be distinguished, as this court has done, from those relating to tangible personal property generally.

Counsel recite the facts in *Frick v. Pennsylvania*, supra, *Blodgett v. Silberman*, supra, *Union Refrigerator Transit Co. v. Kentucky*, supra, and *City Bank Farmers' Trust Company v. Schnader*, supra. In those cases the situs in the state other than the domicile had been of longer duration than in the case at bar and in none of them was there any showing of present intention of the owner to dispose of the goods or to change the situs. From those cases counsel conclude that the federal reserve notes in this case had not acquired an Illinois situs at the time of the gift because the duration of situs was not as long as in the cases cited. Counsel's conclusion is, we believe, erroneous. Counsel rely

on cases which cluster around the pole, to use Mr. Justice Holmes' metaphor. It does not follow, because the case at bar is not as near to the pole as are the cases cited by counsel, that it is not on the same side of the line.

The authorities which we have cited in the preceding pages establish, we believe, that the case at bar is on the same side of the line as *Frick v. Pennsylvania* and other cases relied on by counsel. The element of permanency was present in this case.

B. Tangible Personal Property May Have a Situs in a State Despite the Intention of the Owner, at the Time Situs Is Established, to Dispose of the Goods or Move Them in the Immediate Future.

A second ground upon which petitioner bases his assertion that the federal reserve notes did not have a situs in Illinois is that situs cannot be acquired unless it appears that the owner has no present intention to dispose of the goods or move the property from the state. Counsel argue that because when Dr. Hayes acquired the federal reserve notes he intended to dispose of them in the near future they did not acquire situs in Illinois. Petitioner's argument is, we believe, based upon a misconception of the law.

Dr. Hayes had no intention to remove the federal reserve notes from Illinois so long as he owned them. After he had disposed of the notes and had ceased to own them, it was immaterial to him whether the notes remained in Illinois or were sent elsewhere.

In *Coe v. Town of Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715, part of the property which was considered consisted of logs which had not yet entered upon transportation to another state, but as to those the facts showed that the owner intended that they should shortly be started on their journey in interstate commerce. The court held that the intention of the owner to remove the property from the state did not affect the jurisdiction of the state where the logs were located so long as they were not actually started on their journey in interstate commerce. In *General Oil Company v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the court sustained the jurisdiction of the State of Tennessee to tax property in that state when the facts showed an intent by the owner to ship the property from the state in the immediate future and the owner stored the property while in the state in tanks marked to indicate that purpose. In *Bacon v. Illinois*, 227 U. S. 504, 33 S. Ct. 299, 57 L. Ed. 615, the ultimate destination of the grain in New York and Philadelphia and other eastern cities was determined before Bacon, the owner at the pertinent time, acquired title to the grain. The removal of the grain from railroad cars to the owner's elevator was not for the purpose of changing its ownership, consignee, or destination, and the facts showed that all of the grain was later shipped to the destinations originally specified in accordance with the purpose determined even before Bacon acquired the grain. In sustaining the jurisdiction of the State of Illinois, where the grain was then located, to tax the grain, the court said:

"But neither the fact that the grain had come from outside the state, *nor the intention of the owner to send it to another state*, and there to dispose of it, can be deemed controlling when the taxing power of the State of Illinois is concerned." (Italics ours.)

Counsel have reached an erroneous conclusion by reliance only on cases where the facts showed no intent of the owner to dispose of the goods or move them in the immediate future, and by disregard of other cases which hold that situs may exist despite a positive showing of the owner's intent to dispose of the goods or move them from the state in the immediate future.

C. The Owner Need Have no "Business Purpose" in Placing Property in Another State in Order to Establish Situs.

A third ground advanced by petitioner for distinguishing this case from the cases applying the general rules is, apparently, that situs cannot be established unless there is present some business purpose for placing the property in a state other than that of the domicile of the owner. Petitioner cites no authority to indicate that the presence of a business purpose is essential. Petitioner merely cites cases wherein the facts showed a business purpose and concludes that a business purpose is indispensable to situs. It is on that ground that counsel distinguish *Brown v. Houston*, supra, and other cases discussed in earlier pages of this brief (ante, pp. 18-22).

But the very cases on which counsel rely in other respects refute the idea that business purpose is essential. Thus, in *City Bank Farmers' Trust Co. v.*

Schnader, supra, the court held that an art collection loaned for the purpose of exhibition in a state other than that of the owner's domicile had a situs in that other state; and in *Frick v. Pennsylvania*, supra, furnishings of a country estate in Massachusetts were held to have a situs in a state other than the domicile. An exhibition of an art collection is not a business, and the use of furnishings in a summer home is not business. At least if such things do constitute business, then the direct management of financial affairs by a Chicago agent, which was the fact in the present case, is business.

It is not necessary, we submit, to have present an element of business in the purpose of the owner in placing tangible personal property in a state in order to give that property a situs in that state.

D. It Is Immaterial that a Taxpayer's Motive in Adopting a Course of Action Is to Reduce or Avoid Taxes.

The final ground upon which petitioner relies in asserting that this case is not governed by the general rules is that in the present case the sole purpose of the decedent in establishing a situs in Illinois for the property which was the subject of the gift was to be able to make a gift without liability to the State of Oregon for any transfer tax. As stated by counsel:

> "Such jurisdiction is not defeated by a change in the nature of the gift or of its location when made for the purpose of evading the tax." (Petitioner's Supplemental Brief, p. 11.)

The fact that a man's motive in adopting a certain course of action is to avoid taxes is immaterial in deter-

mining the extent of his tax liability. That principle has been recognized by this court on several occasions.

Thus, in *United States v. Isham*, 17 Wall. 496, 21 L. Ed. 728, wherein the Government sought to condemn conduct by defendant as a device to avoid payment of stamp duty and as a fraud on the revenue law, the court gave two answers, the first of which was phrased as follows:

> "That if the device is carried out by means of legal forms, it is subject to no legal censure."

In *Bullen v. Wisconsin*, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830. Mr. Justice Holmes made the following often-quoted statement:

> "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits."

In *Superior Oil Co. v. Mississippi*, 280 U. S. 390, 50 S. Ct. 169, 74 L. Ed. 504, wherein it was asserted that a taxpayer had adopted a certain procedure in order to evade taxes, the court said:

> "The fact that it desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it."

In *Gregory v. Helvering*, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596, the court said:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or

altogether avoid them, by means which the law permits, cannot be doubted."

If a statute imposes a tax on certain transactions a man is free to avoid the tax by refraining from transactions covered by the act. Thus, if an automobile owner wishes to avoid or reduce taxes on the sale of gasoline, he may do so effectively merely by refraining from purchasing gasoline and accepting the inconvenience of being without automobile transportation. Furthermore, if by acting in a particular way he can reduce his tax liability, and if he takes affirmative action to put himself into the more favored tax class, he will succeed in reducing his taxes even though that was his plain intent. Thus, an investor who owns securities the income from which is taxable may sell those securities and purchase tax exempt securities with the resulting disadvantage of reduced income. He will succeed in reducing his taxes even though that was the primary purpose which motivated him.

Of course, if a man acts under a misconception of existing law and a court of last resort later determines that his interpretation of the law was wrong, he may fail in his efforts to reduce his taxes; but his failure does not depend upon the fact that his motive in adopting a particular course of action was to reduce taxes. That was the situation in *Gregory v. Helvering*, supra. The taxpayer, to reduce her taxes, adopted a plan which she, from her reading of the revenue act, believed to be a tax-free transaction. She failed, not because she was motivated by a desire to reduce taxes, but because the court determined that her interpretation of the act relating to reorganization of corpora-

tions was different from that which the legislature intended.

Most of the so-called tax avoidance cases which come before the courts are not within the categories discussed in the preceding paragraphs. For the most part the decisions involve cases wherein the taxpayer adopts a certain course of conduct and the tax collector asserts that the actual transaction was not that which it appeared to be on the surface, or that which the taxpayer endeavored to make it appear to be. In such cases, if the taxpayer can establish that his transaction was in fact that which it appeared to be and was one which removed him from the reach of the taxing statute, he will be successful in his efforts to reduce his taxes. On the other hand, if the tax collector can show that the transaction was not real or was not in fact that which it appeared to be on the surface, the taxpayer will be unsuccessful in his attempt to reduce his taxes.

The test to be applied in cases of that nature was stated in *Chisholm v. Commissioner*, 79 F. (2d) 14, certiorari denied, 296 U. S. 641, 56 S. Ct. 174, 80 L. Ed. 456, wherein Circuit Judge Learned Hand wrote as follows:

> "The question always is whether the transaction under scrutiny is in fact what it appears to be in form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as a whole is different from its appearance. True, it is always the intent that controls; and we need not for this occasion press

the difference between intent and purpose. We may assume that purpose may be the touchstone, but the purpose which counts is one which defeats or contradicts the apparent transaction, not the purpose to escape taxation which the apparent, but not the whole, transaction would realize."

In a recent text, Paul, Studies in Federal Taxation (1937), the author, after reviewing many decisions of this court and lower federal courts, summarizes the principles of so-called tax avoidance cases as follows:

"Even in the most involved case the court reaches its conclusion in a very simple way. It tests the allegations as to what has been done by asking whether the taxpayer intends to abide by what he has done. Are his transactions real in the sense that he will live by them in the future? Does the form acquire substance in the sense that the taxpayer will accept the disadvantages, as well as the advantages, of what he does? Is he prepared to abandon and relinquish the benefits of the conditions existing prior to his tax-avoiding transaction? If he is, the transaction is real. (pp. 136-137.)

. . . . . .

"There is in all tax avoidance cases the same element of election. The taxpayer chooses between alternatives to each of which he has an equal right, but both of which he cannot have. He cannot change his position, or play fast and loose with the consequences of what he has done. If he is ready to accept consequences, he may avoid tax. If he dodges consequences, his attempt to avoid will fail." (p. 140.)

The same thought is expressed in Cooley, on Taxation (4th Ed.), Sec. 548 (cited by counsel for petitioner, Supplemental Brief, p. 13). Therein, after stating circumstances in which a taxpayer may succeed in reducing taxes, the author says:

> "On the other hand, taxation cannot be avoided (1) by a plan in itself unlawful or (2) by a plan lawful in itself, *not actually carried out*, which is a mere subterfuge to escape taxation." (Italics ours.)

Two decisions written by the same Circuit Judge, which involve facts substantially similar in all respects but one, will illustrate the distinction between the cases wherein a taxpayer is successful in avoiding taxes and one wherein he is not. The cases are *Commissioner v. Riggs*, 78 F. (2d) 1004, and *Commissioner v. W. F. Trimble & Sons Co.*, 98 F. (2d) 853. In the *Riggs* case the court followed in large measure the reasoning of the court in the Second Circuit in *Commissioner v. Dyer*, 74 F. (2d) 685, a companion case involving identical facts. In both the *Riggs* and *Trimble* cases the actions of the respective taxpayers were motivated by desires to reduce income taxes. In both the taxpayer sold securities for the purpose of establishing deductible losses. Both arose under revenue acts substantially the same which denied to the taxpayer the right to deduct losses from sales if within thirty days before or after the sale the taxpayer has acquired or entered into a contract or option to acquire substantially identical securities. In both cases the taxpayer sold securities near the end of a calendar year and reacquired the same securities after the beginning of the next calendar year, but at a time more than thirty

days after the date of the sale. The taxpayer failed in his effort to avoid taxes in the *Riggs* case but succeeded in the *Trimble* case.

The essential difference between the two cases lies in the fact that in the *Riggs* case, although there was no express contract by which the taxpayer acquired the right to repurchase the property, there was in fact at the time of the original sale an agreement or understanding that the taxpayer would repurchase. On the other hand, in the *Trimble* case there was in fact no contract or agreement or option relating to a repurchase, and the repurchase when made was an independent transaction not related to the original sale by the taxpayer. In the *Riggs* case the transaction carried through in the form of a sale was not in fact a sale; it was not real. In the language of Judge Learned Hand, the original agreement for sale had "a collateral defeasance". On the other hand, in the *Trimble* case the original sale was real. Thereby the taxpayer cut all strings on any rights in the thing sold. In the language of the text writer quoted above, the taxpayer in the *Trimble* case was prepared to "live by" his sale "in the future" and was prepared to "accept the disadvantages as well as the advantages" of what he did.

There is a type of case of somewhat different nature which is illustrated by *Minnesota Tea Co. v. Helvering*, 302 U. S. 609, 58 S. Ct. 393, 82 L. Ed. 474. In that case the corporation had assets consisting of cash to the extent of $426,000, and was indebted to others to the extent of $106,000. If the full amount of the cash could have been distributed to its stockholders as a step in a reorganization, none of the cash would have been subject to payment of tax by the corporation.

If a part of the cash necessary to pay debts had been paid direct to creditors, that part would have been subject to the payment of tax by the corporation. In those circumstances the corporation's stockholders adopted a resolution directing the distribution of all the cash to the stockholders upon the promise of all stockholders to assume and pay the debts of the corporation. That was in fact done. The court held, however, that the corporation was subject to tax upon the $106,000 just as though the corporation had paid that amount direct to its creditors. The court said:

> "A given result at the end of a straight path is not made a different result because reached by following a devious path."

If a taxpayer wishes to accomplish a given result and that very result produces liability for taxes, his taxes will not be reduced merely because he adopts a scheme for accomplishing the result more elaborate than one which would produce the result directly. If he insists on control of the situation—if he keeps the reins in his own hands—so that he can be sure that there will be no deviation from the circuitous path until the end he desires is attained, his tax liability will be the same as though he had pursued a direct course. The intermediate steps, wholly unnecessary, do not alter the fact that the elaborate transaction is in essence precisely the same as the taxable direct transaction. The fact that a desire to reduce taxes moved him to adopt the circuitous route is immaterial. The material thing is that a transaction, controlled by him from its inception to its conclusion, is a single transaction even though more elaborate than necessary.

Let us apply the principles discussed in earlier pages to the facts of the present case.

Was the transaction in the present case real? The first step in the transaction was the sale of bonds owned by Dr. Hayes. Those were actual sales made in the open market and when the sales were made Dr. Hayes cut all strings which he had ever had on the bonds. Of necessity he had to live by the consequences of that act. Bonds fluctuate in value from time to time. If, after the sale of those bonds, market prices of bonds had risen, Dr. Hayes could not have reaped any benefit. When he made those sales, he committed himself to the acceptance of the possible disadvantage of a market rise. After that first step he was free to go on as he did or to stop there. His second step was the purchase of federal reserve notes. At that time he owned no property involved in this transaction and had no strings on any property other than the federal reserve notes. Again, at that point he was bound to no one and could have changed his mind with responsibility to no one. His third step was the transfer of those notes by gift. There was nothing unreal or fanciful or pretended in that gift. The agreement is set out in full in this record and petitioner has not asserted and will not assert that the transfer was anything different than it appears to be on its face.

When the transfer was completed, Dr. Hayes' interests ceased. After the trustee received the gift it was free to invest the corpus of the trust in real or personal property (R. p. 30). The manner in which it exercised that discretion could have had no effect on the preceding conduct of Dr. Hayes and could not

have made taxable a transaction theretofore completed and which was not subject to tax.

This case is not one such as the *Minnesota Tea Company* case. To make this clear, we will assume facts which might be within the principle of that case. Assume that Dr. Hayes owned 450 bonds of the denomination of $1000 each. He desired to make a gift of those specific bonds but in a manner so that the transfer would not be subject to Oregon tax. Since the bonds were intangible personal property, a direct gift of the bonds in contemplation of death would be subject to Oregon inheritance tax because, ordinarily, intangible personal property has a situs for inheritance tax purposes at the domicile of the owner. Consequently he developed a complete plan with his Chicago bank, which was to be named as trustee, and he carried through that plan step by step. He borrowed on his personal promissory note $450,000 from the Chicago bank and pledged the 450 specific bonds as collateral. With the proceeds of the loan he purchased federal reserve notes in the amount of $450,000. He then executed a deed of gift of the notes to the Chicago trustee. The trustee, in accordance with the original provisions of the plan, used the notes to pay off the loan and took as assets of the trust estate the 450 specific bonds pledged with the bank and theretofore owned by Dr. Hayes. In the circumstances thus assumed, the net result of the entire transaction would be that title to specific intangible personal property owned by Dr. Hayes would vest in the trustee. Furthermore, while that transaction was in progress and while Dr. Hayes was nominally the owner of the federal reserve notes, the notes would not be subject to

his full dominion and control because the bank would have a string on them. That string, that right in the bank to control the notes, would be the result of the agreement between Dr. Hayes and the bank that as soon as the deed of gift was executed the bank would forthwith take possession of the notes to pay off the loan and release the collateral. Likewise, during the entire transaction, by virtue of his agreement with the bank, he would have a string on the bonds until title thereto vested in the trustee. In those circumstances Dr. Hayes would have assumed absolutely no risk different from that which would have accompanied a direct gift of the specific bonds to the trustee.

In those assumed circumstances the net result of the entire transaction would be a transfer of specific intangible personal property from the owner to the trustee. The ultimate result of the transaction would be precisely the same as that of a direct transfer from the owner to the trustee without the use of the mechanism of the promissory note and the federal reserve notes. The direct transaction would have been taxable by Oregon, the state of Dr. Hayes' domicile. Under the rule of the *Minnesota Tea Company* case, the indirect transaction which accomplished the same result by the devious path would likewise have been subject to tax by the state of Dr. Hayes' domicile.

But the facts in this case are different. The transaction here involved was a transfer of federal reserve notes. It was not a transfer of intangible personal property originally owned by Dr. Hayes because those securities were sold in the open market and title thereto was never vested in the trustee. It was not a

transfer of property acquired by the trustee by the use of the federal reserve notes after the trust was created because Dr. Hayes never owned or had any interest in that after-acquired property.

The present case was not a transfer of intangible personal property by a devious path. It was a transfer of tangible personal property situated in Illinois—a transaction not subject to tax. The transaction was real. There was nothing concealed about it. Dr. Hayes was not doing one thing and at the same time calling it something different. The transaction did not produce a taxable result and it is immaterial that Dr. Hayes' motive in acquiring tangible personal property situated in Illinois for the purpose of transferring that specific property to the trustee may have been to reduce taxes otherwise payable to the State of Oregon.

The authorities cited by counsel for petitioner (Supplemental Brief, pp. 11-21) are distinguishable.

The first authority cited is *Shotwell v. Moore*, 129 U. S. 590, 9 S. Ct. 362, 32 L. Ed. 827. In that case the taxpayer, a few days before the date fixed by the state statute for assessment for personal property generally, used a balance on deposit in a bank and purchased federal legal tender notes or greenbacks. On the assessment date he owned the greenbacks. A few days later he redeposited them to his credit in the same bank. Greenbacks by federal statute were exempt from state tax. The taxpayer resisted the state tax upon the ground that Ohio had no right under the federal statute to tax greenbacks. The court discussed the question of whether in those circumstances the taxpayer would have a defense at law to resist pay-

ment of the tax if the tax were in fact a tax on the greenbacks but specifically refrained from deciding that point. The Ohio statute, quoted in the margin of the opinion of the Supreme Court at page 594, imposed a tax on personal property including,

> ". . . sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within that time invested in, or converted into, bonds or other securities of the United States or of this State, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; . . ."

The court said at page 597:

> "Waiving the question whether these equitable considerations would constitute a defense in an action at law to collect the tax in suit, we proceed to inquire whether the statute of Ohio made all assessments for taxes relate by an iron rule to the day preceding the second Monday in April, and to property possessed on that particular day, and that only. Is such a construction of the law of the State of Ohio a proper one?"

The court then proceeded to construe the statute quoted above and concluded that the tax in question was not a tax on greenbacks but was a tax on the average amount of credits owned by the taxpayer within the preceding year and invested in or converted into tax-exempt greenbacks. The court, at page 600, said specifically that the tax was not a tax on securities of the United States but was a tax on other investments and moneys on deposit subject to order.

The decision of the court in that case, resting as it did on an interpretation of the Ohio statute which did not impose a tax on greenbacks, is no authority to support a conclusion that, if the tax were to be determined on the basis of property held on a single day and if on that day the taxpayer had owned greenbacks, the tax could have been imposed if it were proved that the taxpayer's purpose in acquiring the greenbacks was to reduce his state taxes.

Counsel for petitioner cite the case as holding that the attempt at fraud on the revenue law was sufficient to defeat the taxpayer's purpose. Although the court expressed its disapproval of the conduct of the taxpayer, the court did not adopt any such rule and did not hold anything opposed to the later cases of this court which we have cited. The taxpayer's purpose in particular conduct is immaterial if he in fact does that which he purports to do. The *Shotwell* case does not hold that the purpose of the taxpayer will alter the result. It merely holds that the tax there imposed was a tax on credits held during the year by the taxpayer and was not a tax on greenbacks.

The Oregon Supreme Court reviewed the *Shotwell* case and recognized that it was to be distinguished from the case at bar on substantially the grounds as we have outlined them (28 Oregon Advance Sheets 103, 125, 86 P. (2d) 424, 433).

In *Brock & Co. v. Los Angeles County*, 8 Cal. (2d) 286, 65 P. (2d) 791, the facts were that the taxpayer, domiciled in California and engaged in the jewelry business, transported a large stock of jewelry from California to Hawaii and held it there until the tax

assessment date had passed and then returned it to California. In holding that California had jurisdiction to tax, the court had to distinguish cases such as *Brown v. Houston* and *General Oil Company v. Crain* cited in earlier pages. The California court asserted that such cases were distinguishable because therein the facts showed no intent on the part of the owner to return the goods to the state of the domicile. If that is a sound distinction, the California case is still no authority opposed to respondents' contentions here. In the present case the federal reserve notes never were in Oregon prior to acquisition by Dr. Hayes, they were in Chicago all the while he owned them and, to the knowledge of the parties, have never since been in Oregon. Dr. Hayes did not take the notes out of Oregon and he never intended to bring them into Oregon.

Whiting Finance Co. v. Hopkins, 115 Cal. App. 756, 2 P. (2d) 461, and *West Virginia Mortgage & Discount Corporation v. Newcomer*, 101 W. Va. 292, 132 S. E. 748, are essentially the same. In both, the taxpayer, in order to establish deductible debts, executed notes for large sums shortly before the assessment date, purchased government bonds, and shortly after the assessment date sold the bonds and satisfied the notes. In the West Virginia case, there was some question whether the bonds were ever actually purchased. In both the purpose was to reduce taxes.

The California statute taxing credits permitted a deduction of "the *just* debts owing by him". The court in effect held that the debt incurred in those circumstances was not a "just" debt. The case depended upon the meaning of the California statute and no constitutional question was involved.

The West Virginia case is an excellent example of the type described by Judge Learned Hand in *Chisholm v. Commissioner*, supra, which we have quoted. The purported contract was not real; it was utterly different from that which it appeared to be on the surface.

We cannot reconcile the case of *In re People's Bank of Vermont, Ill.*, 203 Ill. 300, 67 N. E. 777, with the position respondents take in this case, or with the decisions of this court. While recognizing the right of a taxpayer to purchase tax-exempt property, the Illinois court apparently took the position that every transaction, the purpose of which is to reduce taxes, is "fraudulent in law". If that was the Illinois law in 1903, it certainly is not the law now recognized in the decisions of this court cited above.

In *Durham v. Anderson*, 6 Ind. App. 23, 32 N. E. 104, the taxpayer had a time deposit in a bank drawing interest. Shortly before the tax assessment date he wrote a check on the bank and the amount thereof was delivered to him in greenbacks. The greenbacks were left with the bank. Indeed, they were a part of the bank's reserve, and if the taxpayer was in fact the owner thereof, the bank's reserve was illegally depleted. Shortly after the assessment date, his account was credited with the amount of the greenbacks. The bank paid interest on the full balance of his account without deduction on account of the reduction thereof by the transaction described. The suit was not for the tax but was for penalty for fraudulent evasion of tax. The case is patently one where the transaction was not real. There was the most obvious "collateral defeas-

ance". The Indiana court was clearly correct in sustaining the imposition of the penalty.

The Oregon case of *Poppleton v. Yamhill County*, 8 Or. 337, is one often cited in the so-called tax avoidance cases. It is an excellent case to illustrate the very distinction we have drawn between a case where the transaction is only apparent and one where it is real. Therein, the taxpayer, to reduce taxes payable to the county of his residence, placed $13,000 of securities in the hands of one living in another county of the state nominally to secure the payment of the taxpayer's note for $1,000. If it was a pledge in "good faith" the securities were not taxable in the county of his residence. Among other facts, it appeared that "the security was greatly disproportioned to the debt," that Poppleton's affairs were such that he had no need to borrow, and particularly, that while the securities were supposed to be pledged one of the notes so deposited was delivered to him to enable him to collect payments on account thereof. From those facts the court concluded that "he had control of these notes" at all times and that the pretended pledge was in truth no pledge at all. That which he tried to make appear as a pledge was not actually a pledge. The transaction was not real.

The Oregon Supreme Court distinguished the *Poppleton* case from the case at bar on that ground. In the *Poppleton* case, so the Oregon court said, "the transaction was not genuine" and the pretended action "had never taken place" (28 Oregon Advance Sheets 103, 125-126, 86 P. (2d) 424, 433).

We believe that all the authorities cited by petitioner on this point of the effect of the motive to reduce

taxes are distinguishable upon the grounds which we have discussed in the preceding pages.

There is another distinction. Counsel at page 13 of petitioner's supplemental brief quote Cooley, on Taxation (4th Ed.), Sec. 548, in part as follows:

> "If the transaction is merely a temporary change of property from nonexempt into exempt property, made shortly before the assessment, with the intent of restoring the property to its original form after the assessment, there is such fraud as warrants taxation of the property; . . ."

This was not a case within the rule stated by the text writer, and if the authorities cited by counsel are intended to support that rule they are not in point.

Prior to the initiation of the steps taken by Dr. Hayes reviewed above, he owned intangible personal property. We will assume that Oregon had jurisdiction over that intangible property by reason of the fiction *mobilia sequuntur personam*; but no property involved in this case other than that intangible personal property originally owned by the decedent ever had an Oregon situs. The federal reserve notes had an Illinois situs. He did not take the notes from Oregon to Illinois. The notes never were in Oregon. After the transfer thereof was complete and the trust established in Chicago, the trust and all assets thereof had an Illinois situs. The intangible personal property acquired by the trustee after the gift was complete had an Illinois situs because the trustee owned the bonds, was domiciled in Illinois and was engaged in administering an irrevocable trust in Illinois. That trust property was subject to tax only by Illinois and was

beyond the jurisdiction of the state of the domicile of the settlor, who had no interest whatsover in the property, and of the state of the domicile of the beneficiaries of the trust who had the right only to receive income. *Safe Deposit & Trust Co. of Baltimore, Maryland, v. Virginia,* 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180. It cannot be said that there was any intent to restore or that there was in fact a restoration of the property to its original form when the facts show that the tangible personal property which was the subject of the gift and the intangible personal property later acquired by the trustee, but never owned or controlled by the decedent, never had an Oregon situs.

V. CONCLUSION

Throughout the supplemental brief of petitioner, counsel suggest that this case should be disposed of by equitable considerations. At pages 10 and 21, counsel refer to the duty of the decedent to the State of Oregon to pay taxes. We do not believe that fundamental questions of jurisdiction of a state under the Federal Constitution to impose taxes upon property beyond its limits can be disposed of by appeals based on what are claimed to be equitable considerations.

However, if the equities of this case are to be considered, they support the position of respondents rather than that of petitioner. Dr. Hayes for years before his death had done his business in Illinois through Harris Trust and Savings Bank, his agent, and for many years prior to coming to the State of Oregon to establish residence late in life he had the protection of the State of Illinois and its laws for his estate. Dr. Hayes might have handled his affairs so as to give substantially all of his property a situs for

taxation in Illinois, and if he had done so, he could not have been criticized. As a matter of fact, he established an Illinois situs for substantially less than one-half of his property and retained the balance of his estate in such a form that by application of the fiction *mobilia sequuntur personam* over one-half of his estate was subject to Oregon inheritance tax. Dr. Hayes lived in Oregon for only the last three years of his life and every equitable consideration would lead to the conclusion that Oregon, being in a position to impose an inheritance tax on property of his estate worth $637,000 (R. p. 3), has no sound ground for complaint.

But this case must be decided, not in accordance with indefinite equitable principles which either party might consider to be applicable, but rather upon the application of the principles established by this court with respect to the question of the jurisdictional power of Oregon under the Fourteenth Amendment to tax a transfer of tangible personal property situated in Illinois. The so-called equitable considerations relied on by petitioner might be to the advantage of Oregon but, by the same token, they would be to the disadvantage of the State of Illinois where the property transferred was situated.

The decisions of this court compel the conclusion, we believe, that the federal reserve notes transferred by Dr. Hayes by the trust agreement dated August 15, 1935, had a situs in Illinois at the time of the transfer and that no state other than Illinois has jurisdiction to levy an inheritance tax on that transfer, and, in particular, that Oregon, merely because Dr. Hayes was domiciled therein at the time of the transfer, has

no jurisdiction to tax the transfer. The procedure by which the tangible personal property was acquired and was given a situs in Illinois was lawful and was actually carried out. The transaction was real. There was no subterfuge. Dr. Hayes did not pretend to do one thing while in fact doing something different.

The decision of the Supreme Court of Oregon holding that Oregon does not have jurisdiction to tax the transfer should be affirmed.

Respectfully submitted,
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APPENDIX

Act of May 12, 1933, 48 St. L. 52, as amended by Act of June 5, 1933, 48 St. L. 113 (U. S. C. A. 31:462).

See reference to this statute, ante, p. 10:

"Sec. 462. Coins and currencies. All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1939.

Walter E. Pearson, State Treasurer of the State of Oregon, Petitioner,
vs.
Ruth Hayes McGraw, and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, deceased, etc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 4, 1939.]

Mr. Justice Douglas delivered the opinion of the Court.

Hayes, respondents' decedent, died testate in 1936 and was at the time of his death a resident of and domiciled in Oregon. In earlier years when he had resided in the middle west he placed in possession of an Illinois trust company various stocks, bonds and other intangibles, which trust company acted as his agent in collecting principal and income on those securities and in the investment of his funds. When decedent established a domicile in Oregon in 1933, he continued that arrangement with the Illinois trust company, with the result that those securities were always physically present in Illinois, never in Oregon. August 8, 1935, about six months before decedent's death, he directed the Illinois trust company to sell and liquidate sufficient of his bonds held under that agency arrangement in Illinois to procure a sum which, together with cash balances in his checking account with the trust company, would equal $450,000 and to purchase therewith, as his agent, federal reserve notes of the face amount of $450,000. Between August 8, 1935 and August 12, 1935, the Illinois trust company complied with decedent's directions[1] and prior to August 15, 1935, it pur-

[1] On the sale of bonds in the open market the trust company realized for decedent's account $176,062.01. On August 12, 1935, decedent borrowed from the trust company on a demand note $183,937.99. On that date decedent had a balance in his checking account with the trust company in excess of $90,000.

chased $450,000 of federal reserve notes and held them in Illinois as agent for decedent for a few days.

On August 15, 1935, decedent executed in Oregon a trust agreement under which the Illinois trust company was designated as trustee and by which decedent transferred to it as trustee the federal reserve notes. That trust was for the benefit of certain designated relatives and was irrevocable. Under it decedent retained no interest or power whatsoever. The trust company held those federal reserve notes under the trust agreement for about five days. Then from time to time after August 19, 1935, the Illinois trust company used the federal reserve notes, pursuant to the terms of the trust agreement, to purchase bonds and other personal property for the account of the trust.[2]

Admittedly, Oregon had jurisdiction to tax but for the alleged prohibition in the Fourteenth Amendment, for the statute in question imposed a tax on intangibles as well as tangibles which passed by deed or gift made in contemplation of the death of the grantor.[3] But the Supreme Court of Oregon held that that constitutional prohibition was present since neither the securities or cash used to purchase the federal reserve notes nor the notes themselves were ever in Oregon but always in Illinois. Though admitting that intangibles would have been taxable by Oregon under such circumstances, the court in reliance on *Blodgett* v. *Silberman*, 277 U. S. 1, concluded that the federal reserve notes were tangibles. And since decedent had retained them in Illinois for a few days prior to August 15, 1935, without any intention of bringing them to Oregon, they had acquired a so-called business situs in Illinois which con-

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With the funds so obtained the trust company purchased the $450,000 of federal reserve notes mentioned. Between August 12, 1935, and August 29, 1935, the trust company, on directions of decedent, sold in the open market additional bonds held by it in the agency account and as proceeds of those sales were received by it, it paid off the demand note. That note was entirely paid on August 29, 1935.

2 None of the property thus acquired by the trustee was ever owned by decedent; the trustee did not purchase or acquire any of the bonds or other assets which at any time constituted a part of the property held by the trustee as agent for decedent under the earlier arrangement.

3 "All property within the jurisdiction of the state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass or vest . . . by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate made in contemplation of the death of the grantor, . . . to any person or persons, . . . in trust or otherwise, . . . shall be and is subject to tax at the rate hereinafter specified in section 10-603, to be paid to the treasurer of the state for the use of the state; . . ." (§ 10-601, O. C. 1930.)

stitutionally prevented Oregon from exacting a tax for their transfer.[4] And this conclusion was reached though admittedly the transfer of the notes under the agreement of August 15, 1935, was made in contemplation of death. We granted certiorari because of the importance of the constitutional question involved and of an alleged probable conflict with the principles underlying such decisions as *Curry* v. *McCanless*, 307 U. S. 357.

We disagree with the conclusion of the Supreme Court of Oregon. Oregon having jurisdiction to tax by reason of the statute was not deprived of it by the Federal Constitution.

On the facts of this case we believe that the various steps in the series must be considered as constituting but one integrated and indivisible transaction—a transfer by decedent of intangibles in contemplation of death. And we reach this result though each step in the series was real and though none was camouflaged or concealed. For basically the sale of intangibles, the acquisition of federal reserve notes, and their transfer under the agreement of August 15, 1935, were interdependent. Cf. *Groman* v. *Commissioner of Internal Revenue*, 302 U. S. 82; *Helvering* v. *Bashford*, 302 U. S. 455, 458. From decedent's point of view, completion of the series of steps was necessary for consummation of his program to utilize $450,000 of his estate to provide for certain designated members of his family.[5] Any step short of the final transfer would not have done it. The mere sale of the intangibles and the acquisition of the federal reserve notes had no functional or business significance apart from the August 15, 1935 transfer. That is emphasized here because they created no legal relations and gave rise to no vested rights interfering with decedent's continuing power of disposition. Taken as isolated transactions, they have meaning and significance only in relation to the third step, a conclusion made especially evident by the close sequence of events. Hence, it is no answer to say that because the first two steps were not irre-

[4] 86 P. (2d) 424, 87 P. (2d) 766. It seems clear that the Oregon Supreme Court reached this result by reliance on the Fourteenth Amendment and the decisions of this Court thereunder. We do not have, therefore, a case where the state court was merely construing its statute nor a case where it is not clear whether or not it was doing more than that. Cf. State Tax Commission v. Van Cott, 306 U. S. 511.

[5] This is in accord with the treatment by the Supreme Court of Oregon of "Dr. Hayes' plan", a "plan" which it felt compelled to divide into separate steps by reason of the principles of decisions of this Court dealing with business situs under the Fourteenth Amendment. Cf. Patterson v. Alabama, 294 U. S. 600.

vocable but could be recalled, the third step was not a necessary one in the series. For that is as immaterial as is the revocability of any donor's plan to make a gift in contemplation of death at any moment prior to its consummation. Admittedly decedent had such a purpose on the transfer of the notes. To hold that such purpose was not present on the sale of the intangibles would be to isolate one part of the total transaction and to give it significance and meaning utterly inconsistent with the fact that the intangibles were sold for the purpose of acquiring the notes which, in turn, were to be placed under an irrevocable trust. Therefore we need not consider the nature of federal reserve notes, for in that posture of the case their taxability as such and in isolation from the whole transaction is not in issue.

Hence to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance. Cf. *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Shotwell* v. *Moore*, 129 U. S. 590. Questions of due process are not to be treated "narrowly or pedantically, in slavery to forms or phrases." *Burnet* v. *Wells*, 289 U. S. 670, 677-78.

Accordingly, the transfer was taxable on the authority of *Curry* v. *McCanless*, *supra*, and related cases. For constitutionally the property was "within the jurisdiction of the state" of Oregon since that jurisdiction is dependent not on the physical location of the property in the state but on control over the owner.

The judgment of the Supreme Court of Oregon is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice McReynolds is of the opinion that the judgment below should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1939.

Walter E. Pearson, State Treasurer of the State of Oregon, Petitioner,
vs.
Ruth Hayes McGraw, and Edmund Hayes, as Executors of the Last Will and Testament of Edward Stephen Hayes, deceased, etc.

On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 4, 1939.]

Mr. Justice Stone.

I concur in the judgment of reversal on the ground that nothing in the Constitution prevents taxation by Oregon of a gift by its citizen of federal reserve notes located elsewhere.

While I do not question that in the circumstances of this case a state could, if so advised, constitutionally tax its citizen for action taken for no other purpose than the evasion of its taxing statutes, no such question is, I think, presented by the record. Discussion of it seems at most to be academic and not to relieve us of the duty of deciding the only federal question which could by any possibility be said to be raised by the record, namely, whether the Constitution precludes taxation of the gift of the banknotes merely because of the physical fact that they are located without the state.

In arriving at the conclusion that the gift of federal reserve notes located outside the state was not taxable, the Supreme Court of Oregon necessarily construed the Oregon statute, which imposes a tax on gifts of "all property within the jurisdiction of the state . . . whether tangible or intangible." The court has said that the banknotes were not within the jurisdiction of the state because their situs was elsewhere, and that the acts of decedent in avoiding the tax by the acquisition of property having an extra-territorial situs were not reached for taxation by state law. If the court did anything more than rule that the statute, by its own terms, did not extend to the taxation of the gift of the notes because they were

located outside the state, it held that the Fourteenth Amendment because of that physical fact withholds, from the state, jurisdiction over the property which the taxing statute asserts.

Petitioner asks us to determine whether that holding is correct. He is entitled to have an answer. We do not rightly avoid giving the answer by saying that, by some statute other than that under review, the state could constitutionally tax its citizen for his action in avoiding the tax, by making the gift in a form of property which is by hypothesis beyond the taxing power. If the state has by its statute undertaken to lay a tax on gifts of banknotes outside the state without more—and we are without jurisdiction if it has not—no purpose is served by saying to the state that it could have reached the same result by another route, which, under its laws, does not appear to be open to it.

As I am of opinion that there is nothing in the Constitution to compel a state to treat federal reserve notes for tax purposes, as chattels were treated in *Frick* v. *Pennsylvania*, 268 U. S. 473, and as no reason has been advanced, even in *Blodgett* v. *Silberman*, 277 U. S. 1, 18, for a different view, cf. *Baldwin* v. *Missouri*, 281 U. S. 586, 591, the judgment should, I think, be reversed upon that ground rather than upon a theory of permissible legislation, of which apparently Oregon's tax laws do not avail.

Mr. Justice FRANKFURTER agrees with my views as to Oregon's power to tax these federal reserve notes, but is of opinion that the record sustains the ground taken in the Court's opinion.